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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSHUA MARTIN PARRA-DAVIS,

Defendant and Appellant.

B239353

(Los Angeles County
Super. Ct. No. GA082269)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Michael D. Carter, Judge. Affirmed.

Esther K. Hong, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson and Elaine F.
Tumonis, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendant and appellant Joshua Martin Parra-Davis guilty of offenses relating to possession of destructive devices under former Penal Code section 12301 et seq.¹ He contends on appeal that the trial court misinstructed the jury on the definition of “destructive devices,” depriving him of his state and federal constitutional due process rights. We hold that any instructional error did not violate his due process rights, and we therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

A. *Prosecution case-in-chief.*

1. Defendant is found in possession of destructive devices.

On January 14, 2011, Genero Vasquez, a custodian at Foothill Middle School in Arcadia, saw defendant walking on campus holding a video camera. Having never seen the man before and intending to ask what he was doing on campus, Vasquez approached defendant, who walked down the street, away from the school. Vasquez followed him to a parking lot. Defendant grabbed a backpack or black pouch from bushes, and put something into the bag or took something out. Defendant put the bag back and walked away carrying a little black object. Defendant ran when he saw Vasquez. Vasquez called the school’s assistant principal, Benjamin Acker, who joined him. Acker called the police.

Officer Joseph Trejo of the Arcadia Police Department responded, and he found a black duffel bag and a suitcase with clothing inside. Inside the bag were a video camera, a medical kit, two firecrackers inside a green pill bottle, three unexpended 12-gauge shotgun shells, flashlights, a rifle scope, two flares, an “electronic toggle switch,” an “R.C.” car battery pack, a “machete type samurai sword,” a 10-inch knife, a flare gun, and two cylindrical devices with a fuse.

¹ Section 12301 et seq. was repealed by Statutes 2010, chapter 711, section 4 (Sen. Bill No. 1080) and continued without substantive change in section 16460 et seq. (See also *People v. Turnage* (2012) 55 Cal.4th 62, 71 & fn. 7.) We refer to the former Penal Code sections in this opinion.

Arcadia Police Officer John Bonomo searched defendant's home. Inside a briefcase, the detective found .98 caliber ammunition, a hand grenade, and a "green hobby fuse." Inside a military green canvas bag, he found a spent casing "crimped off at the end with a green hobby fuse coming out of it," empty casings, a funnel, and metal spoons.

2. Expert testimony.

Los Angeles County Deputy Sheriff Gary Spencer, a bomb technician, testified about the devices.

(a) The pipe bomb.

"Bomb" is a specific term referring to an explosive device designed to kill, injure or destroy property. A bomb generally requires confinement using some type of container, a low explosive powder, and a system to initiate the powder. A "high explosive" bomb, however, does not require a container, for example, five sticks of dynamite would not need a hardened container.

Spencer examined an "improvised explosive device," "similar to a pipe bomb." It was a cylindrical object, apparently made of metal, with a screw-on-cap out of which ran a "cannon fuse or hobby fuse," an item designed to transmit a burn at a controlled rate from one point to another. Hobby fuses are made for recreational purposes, because the fuse allows a separation time between igniting the fuse and the explosion. That a fuse was attached to the device made it "a classic configuration of an improvised explosive device."

There are numerous ways to detonate such a device. The most common, deliberate way, deflagration, would be to light the fuse, which burns down and ignites the powder inside. Another way to detonate the device would be to strike it with a hammer or tool, because the powders used in "these kinds of improvised explosive devices" are sensitive to the introduction of heat and impact and friction. Electrostatic discharge can also initiate powders.

Because they are dangerous, the I.E.D.—improvised explosive device—is the number one weapon of choice in Afghanistan. “Improviseds are homemade so they have a very large unknown quantity to them” that make them “more dangerous.” Because the device was “inherently dangerous,” the detective had to render it safe. One way to do this is to breach the container so that the filler inside can burn off without an explosion or detonation. Deputy Spencer rendered the device safe by placing it inside a bunker and remotely operating it. The device “did high order,” explode.

In Spencer’s opinion this device was a destructive device. His opinion was based on a burn test conducted on the powder showing it to be a deflagrating powder, a “low explosive filler similar to pyrotechnic powder, gunpowder, black powder,” that the powder was in a sealed container allowing for a build-up of pressure, and that the container also had a fuse.

(b) The grenade.

Spencer described the grenade as a “practice grenade” used by the military in training. A practice grenade is designed to explode but not fragment, making it safe for the military to throw. Defendant’s grenade, however, was “modified to make a sealed container by plugging the bottom” or “improvised into a destructive device” by adding a hobby fuse and a low explosive filler and plugging the bottom so that pressure could build and explode the body, propelling fragments at a high speed. Spencer said, “The item that the hand grenade body was made into is an I.E.D.” A “test burn” was conducted of the hobby fuse, which had a rapid rate of burn, much quicker than the usual 42 to 45 seconds a foot. The fuse burned so quickly, the grenade would probably explode in a person’s hand.

Spencer determined that the grenade was also a destructive device, based on its configuration, components, the rapid burn of the powder, and the operational fuse. Had a flame been introduced to the fuse, a deflagration would have caused the container to break and explode, propelling fragments at a very high speed.

Using a remote operation to open the container, Spencer rendered the grenade safe.

(c) Rifle cartridge.

The third item Spencer examined was a rifle cartridge with a hobby fuse inserted in it. The bullet was removed and the top of the cartridge was crimped around the fusing. Spencer's team lit the fuse remotely and detonated it.² Before doing so, they placed watermelons on either side of the device. A fragment of the cartridge was propelled six inches into a melon, and the explosion rent apart the cartridge head.

In Spencer's opinion, the ammunition with the hobby fuse was "definitely" a destructive device, based on the "low explosive powder, a fuse, . . . a container that would confine the burning, [and] the rapid burning of the low explosive powder causing an over pressure." "When the flame or heat is ignited at the end of the fuse, it burns down into the interior, the powder deflagrates causing a novel pressure and explosion, fragmentation of the metal which is propelled away at high speeds similar to a bullet."

(d) .98 caliber (25-millimeter) ammunition.

The .98 caliber ammunition recovered from defendant's home was a live target practice round with a tracer pellet in it.

B. *Defense case.*

Defendant testified that the night before his arrest he was camping above Arcadia, because his mother had kicked him out of the house. He had two bags with him. The morning after camping out, he stored the bags between a Bank of America and McDonald's because he was getting job applications. He was going to retrieve his bags when he heard drum music coming from the middle school. Because he had played in a drum line at the school, defendant went to the school to take some video and to talk to a former teacher.

² The explosion was videotaped, and the video was played for the jury.

Into the device described by Spencer as a pipe bomb, defendant put fountain powder, which creates sparks and a flash of colors. He has made such devices probably over a 100 times, and he expected that the device would simply shoot sparks out of it. He also put fountain powder into the practice grenade. When he had done this before, a big shower of colored sparks shot out. He also made the bullet casing with a fuse coming out of it. When he had made similar devices by inserting a skewer, they shot off like a bottle rocket, and none ever exploded like the one tested by Spencer.

C. Rebuttal case.

Sergeant Vaughn Whalen of the Arcadia Police Department questioned defendant, who denied having a video camera at the school. He also initially denied having a bag with him, but he later said the bags contained his camping gear.

Deputy Spencer testified that if a skewer had been inserted into the ammunition, it still would have exploded. The powder used was not fountain powder. It was pyrotechnic powder. Spencer considers the pipe bomb, the grenade with the fuse, and the shell casing with the fuse to be improvised explosive devices.

II. Procedural background.

An information filed on June 15, 2011 alleged four counts: count 1, possession of a destructive device in and near a public street or highway (Pen. Code, § 12303.2);³ counts 2 and 3, possession of a destructive device near certain places (§ 12303.2); and count 5, possession of a destructive device, namely, .98 caliber ammunition (§ 12303). Count 5 was later amended to allege that defendant unlawfully possessed fixed ammunition (§ 12304).

On January 17, 2012, a jury found defendant guilty of count 1, possession of a destructive device near certain places (§ 12303.2); of counts 2 and 3, the lesser offense of possession of a destructive device (§ 12303); and of count 5, possession of fixed ammunition, to wit, a .98 caliber ammunition, a misdemeanor.

³ All further undesignated statutory references are to the Penal Code.

On February 15, 2012, the trial court sentenced defendant to the midterm of four years on count 1, to a consecutive eight months on count 2, and to a concurrent eight-month term on count 3. Defendant's total sentence therefore was four years eight months.

DISCUSSION

I. Any instructional error did not prejudice defendant.

Defendant contends that the trial court violated his state and federal constitutional due process rights when it added "improvised explosive device" to the definition of a destructive device in jury instructions. We disagree.

"It is settled that, even in the absence of a request, a trial court must instruct on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047; see also *People v. Moye* (2009) 47 Cal.4th 537, 548; *People v. Breverman* (1998) 19 Cal.4th 142, 154.) When an instruction is challenged as ambiguous and subject to an erroneous interpretation by the jury, we review the instruction independently to determine whether there is a reasonable likelihood the jury understood the instruction in the manner asserted by the defendant. (*People v. Cross* (2008) 45 Cal.4th 58, 67-68; *People v. Cole* (2004) 33 Cal.4th 1158, 1210.) " " "In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding . . . all jury instructions which are given." [Citation.]' " (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) A defendant who fails to object below may not raise a claim of instructional error on appeal, unless the claim raises issues concerning substantial rights. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1315, fn. 43; § 1259.)

"The language of a statute defining a crime or defense is generally an appropriate and desirable basis for an instruction, and is ordinarily sufficient when the defendant fails to request amplification. If the jury would have no difficulty in understanding the statute without guidance, the court need do no more than instruct in statutory language."

(*People v. Poggi* (1988) 45 Cal.3d 306, 327.) The trial court here deviated from this general rule when it modified CALCRIM No. 2572.⁴ That jury instruction tracks the statutory language in section 12301, which defines a “ ‘destructive device’ ” as “[a]ny bomb, grenade, explosive missile, or similar device or any launching device therefor.” (§ 12301, subd. (a)(2); CALCRIM No. 2572.) The trial court, however, modified that definition when it instructed the jury that a “destructive device is any bomb, grenade, *improvised explosive device*, or any weapon of a caliber greater than 0.60-caliber which

⁴ The trial court instructed the jury with CALCRIM No. 2572, which provides in full: “The defendant is charged in count 1 with reckless or malicious possession of a destructive device [in] or near a public street or highway in violation of Penal Code section 12303.2. [¶] To prove the defendant guilty of this crime, the People must prove that: [¶] 1. The defendant recklessly or maliciously possessed a destructive device; [¶] and [¶] 2. At the time the defendant possessed the device he was on a public street or highway.

“The defendant is charged in counts 2 and 3 with reckless or malicious possession of a destructive device in or near a private habitation or in or near another public place ordinarily passed by human beings in violation of Penal Code section 12303.2. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant recklessly or maliciously possessed a destructive device; [¶] and [¶] 2. At the time the defendant possessed the destructive device, he was in or near a public [building] or private habitation; or in, on, or near another public place ordinarily passed by human beings.

“A person acts recklessly when (1) he or she is aware that his or her actions present a substantial and unjustifiable risk; (2) he or she ignores that risk; and (3) the person’s behavior is grossly different from what a reasonable person would have done in the same situation. [¶] Someone acts maliciously when he or she intentionally does a wrongful act or when he or she acts with [the] unlawful intent to annoy or injure someone else.

“*A destructive device is any bomb, grenade, improvised explosive device*, or any weapon of a caliber greater than 0.60-caliber which fires [fixed] ammunition, or any ammunition therefore.

“The People do not need to prove that the destructive device was set to explode.

“A person does not have to actually hold or touch something to possess it. It is enough if the person has control over it, either personally or through another person.

“The People allege that the defendant possessed the following destructive devices: [¶] Pipe bomb, improvised explosive device, a grenade, large caliber ammunition.

“You may not find the defendant guilty unless all of you agree that the People have proved that the defendant possessed at least one of the alleged items and you all agree on which alleged item he possessed.” (Italics added.)

fires ammunition, or any ammunition therefore.” (Italics added.) The court also instructed the jury that the devices the People alleged were destructive were the pipe bomb, grenade, and improvised explosive device. Defense counsel did not object to these instructions.

Defendant here argues that injecting the undefined term—improvised explosive device—into the instructions rendered them vague, violating his state and federal due process rights. He states that undefined term created a danger the jury equated something containing explosive powder with being a per se destructive device. In other words, the jury might have thought that mere fireworks constituted destructive devices. Defendant thus notes, that “explosive” has a specific statutory meaning. For the purposes of section 12301, an “explosive” is defined in Health and Safety Code section 12000 et seq. (§ 12301, subd. (b).) The Health and Safety Code provisions make clear that not all “explosives” are “destructive devices.” (See, e.g., Health & Saf. Code, § 12000, subd. (f) [“For the purposes of this part, ‘explosives’ does not include any destructive device, as defined in Section 16460 of the Penal Code, nor does it include ammunition or small arms primers manufactured for use in shotguns, rifles, and pistols”].) Moreover, the jury instructions themselves concerning destructive devices differentiate between “explosives” and “destructive devices.” (See, e.g., CALCRIM Nos. 2571, 2572.) A bomb, for example, may be an explosive and a destructive device. (*People v. Quinn* (1976) 57 Cal.App.3d 251, 259.) But not all explosives are destructive devices, for example, some fireworks are legal (see generally, Health & Saf. Code, § 12500 et seq.), and therefore they might not be a “destructive device” under the Penal Code. That defendant here merely possessed fireworks was the crux of his defense.

Although we agree the trial court should not have modified the definition of “destructive devices,” we do not agree the jury would have construed the modified instruction in the manner defendant suggests or that the modification violated his due process rights and prejudiced him, whether we review the issue under *Chapman v. California* (1967) 386 U.S. 18 (beyond a reasonable doubt) or *People v. Watson* (1956) 46 Cal.2d 818 (a reasonable probability). A “defendant challenging an instruction as

being subject to erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant.” (*People v. Cross*, *supra*, 45 Cal.4th at pp. 67-68.)

It is clear that “improvised explosive device” was the expert witness’s shorthand for a homemade device. Spencer testified that all the devices had been modified; for example, the pipe bomb was made out of a cylindrical object and a hobby fuse; the grenade was “modified” by the addition of a hobby fuse, explosive filler, and plugging the bottom; and the rifle cartridge had a hobby fuse inserted into it. Spencer thus said that “[i]mproviseds are homemade so they have a very large unknown quantity to them” and that the grenade was “improvised into a destructive device.” The term “improvised explosive device,” although not contained in the statutory definition of a destructive device, was therefore not vague or ambiguous or otherwise undefined in the context of the case.

Had the trial court used the statutory language instead of modifying it, we cannot see the result being any different. The statutory definition of a “destructive device” is “[a]ny bomb, grenade, explosive missile, or similar device or any launching device therefor.” (§ 12301, subd. (a)(2)). Had the trial court instructed the jury with this definition, there was overwhelming evidence that the devices were a bomb or a grenade or a similar destructive device. Spencer testified, for example, that the first device, a cylindrical object with a fuse, was an “improvised explosive device” similar to a pipe bomb. A “bomb” is specifically referenced in the statutory definition of a destructive device, and a pipe bomb is merely a type of bomb that is a destructive device. (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25 [“Persons of common intelligence know what a bomb is. [Citation.] It sufficed, under the instant circumstances, for the trial court to merely inform the jury ‘a pipe bomb is a destructive device’ ”].) Spencer also remotely operated the pipe bomb, and it exploded.

The second object defendant possessed was a grenade, a device also expressly defined in section 12301 as a “destructive device.” Spencer did not try to detonate the grenade, but had he lit the fuse, it was his opinion the container would have exploded, propelling fragments at a very high speed.

Finally, Spencer did light the fuse attached to the rifle cartridge, the third device. It exploded, propelling fragments into the nearby watermelon and tearing apart the cartridge head. A video of this explosion was shown to the jury.

Given this evidence, it is not reasonably probable that the jury would have concluded that the devices were merely non destructive fireworks, as defendant asserts. Because this is our conclusion, we reject defendant’s related contention that his trial counsel rendered ineffective assistance of counsel by failing to object to the jury instruction. (See generally, *Strickland v. Washington* (1984) 466 U.S. 668.) A defendant claiming ineffective assistance of counsel must establish both error and prejudice; because no prejudice accrued to defendant by virtue of any instructional error, the claim fails.

DISPOSITION

The judgment is affirmed.

ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.